
**April 25, 2005**

As Majority Leader, Senator Robert Byrd changed Senate precedents through the "constitutional option" four times. In fact, in1995, Senator Byrd boasted about his prior exercise of the constitutional option, specifically the 1977 event:

> **Senator Byrd**: *"I have seen filibusters. I have helped to break them.* . . . I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters. . . . And the filibuster was broken — back, neck, legs, arms. It went away in 12 hours. So I know something about filibusters. I helped to set a great many of the precedents that are in the books here." (Jan. 4, 1995)

## Understanding the Byrd Precedents

- In defending his use of the constitutional option four times in the 1970s and 1980s, Senator Byrd has claimed that his precedents are not a foundation for using the constitutional option to provide for up or down votes on judicial nominees. *See Congressional Record*, S3100-3103 (March 20, 2005).

- Despite Senator Byrd's efforts to distinguish his use of the constitutional option, the three core elements of the option were present in establishing his precedents:

    - Changing Senate procedure <u>through a point of order or the enforcement of a point of order</u>, rather than through a textual change to the Senate Rules themselves.

    - Achieving that change or clarification <u>through a majoritarian procedure</u>, rather than through a procedure requiring super-majority support.

    - Using the change or clarification to <u>curtail procedural options of Senators</u>, including the use of various types of filibusters.

## Responding to Senator Byrd's Attempts to Explain Away his Past Precedents

| Byrd Precedent (by year) | Byrd 2005 | Rebuttal to Byrd |
|---|---|---|
| **1977:** prevented a minority of senators from engaging in the post-cloture filibuster of legislation by establishing a precedent that curtailed their ability to offer amendments and to appeal rulings of the Chair | — Asserts that he merely clarified Rule 22, which states that amendments that are offered post-cloture may not be dilatory<br><br>— Argues that no senator lost the right to debate<br><br>— Claims that a bipartisan supermajority of the Senate "endorsed this necessary effort to halt post-cloture dilatory tactics" | — Does not dispute that he curtailed dilatory, filibuster tactics<br><br>— The right to debate was not at issue; rather, the ability to filibuster by amendment was at issue.<br><br>— Used priority recognition to eliminate the right to appeal rulings of the chair<br><br>— Eliminated reading of amendments as a delaying tactic<br><br>— Was criticized by both parties because his use of the constitutional option, in tandem with use of priority recognition (itself a creation of precedent) eliminated appeals (Muskie, Church, Sarbanes, Javitz) |

| Byrd Precedent (by year) | Byrd 2005 | Rebuttal to Byrd |
|---|---|---|
| **1979**: prevented the Senate from voting on questions of germaneness for certain legislative amendments to appropriations bills by establishing a precedent that was contrary to the plain language of Rule 16, which states that **all** questions of relevancy must be submitted to the Senate for its consideration | — Contends that he was not acting contrary to the plain language of Rule 16 because Rule 16 requires questions of "relevancy" to be submitted to the body, whereas he was dealing with questions of "germaneness" | — Ignores the fact that germaneness is a relevancy concept and has always been interpreted as such; as a result, his precedent violated the plain language of Rule 16 |
| | — Contends that only direct points of order on germaneness must be submitted to the Senate, but that questions of germaneness arising in defense to a point of order on legislation need not be submitted. | — Ignores the fact that the Chair had traditionally treated all questions of germaneness in a uniform way and submitted each to the Senate under Rule 16 |
| | — Asserts that he was acting "to avoid the misuse of precedent" | — Republicans seek to avoid the misuse of precedent, namely, institutionalizing an unprecedented filibuster of judicial nominees |
| | — Argues that he only curtailed the right "to offer certain amendments," while allowing other amendments to be offered | — Eliminated the right of minority senators to promote certain of their amendments on appropriations vehicles |

| Byrd Precedent (by year) | Byrd 2005 | Rebuttal to Byrd |
|---|---|---|
| **1980**: prevented a minority of senators from debating the motion to proceed to a specific nominee on the Executive Calendar by establishing a precedent that conflated two separate motions, one of which had been debatable | — Claims that he was actually "enhancing" the right to filibuster by eliminating the then-existing right to debate (and filibuster) a motion to proceed.<br><br>— Contends that the ability to debate the motion to proceed to a nominee was not "based on any great precedent or legal requirement"<br><br>— Asserts that Senators can still filibuster nominees when the nominee comes before the Senate | — It is untenable to say that eliminating the existence of a debatable motion did not hinder the ability to debate; Senators have traditionally prized debate on motions to proceed<br><br>— The filibustering of judicial nominees is also not based on any precedent or legal requirement<br><br>— Until the 108th Congress, Senators had never filibustered nominees who came before the Senate |

| Byrd Precedent (by year) | Byrd 2005 | Rebuttal to Byrd |
|---|---|---|
| **1987**: prevented a minority of senators from delaying (filibustering) the consideration of legislation by establishing a series of precedents that were contrary to the plain language of Rule 12, which states that questions on excusing a senator from voting during a roll call must be submitted to the Senate for its consideration | — Justifies the precedents as being consistent with the spirit of Rule 4<br><br>— Acknowledges that Republicans were leading a filibuster of legislation, but claims that the precedents were justified because the situation was "extraordinary", the minority's tactics were "abusive", and he could not allow them to be "legitimized" | — Does not dispute that the precedents contravened the plain language of Rule 12 (at the time, he justified his actions by saying, "I do not think the American people are very concerned about the rules of the Senate")<br><br>— The repeated, systematic, partisan and unprecedented use of judicial filibusters is "extraordinary" and "abusive", and cannot be "legitimized" |